UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL SHIPPING AGENCY, INC.,
MARINE TERMINAL SERVICES, INC.,
and TRUCK TECH SERVICES, INC.,
SINGLE EMPLOYER

and **Cases 24-CA-091723**
24-CA-104185

UNION DE EMPLEADOS DE MUELLES (UDEM), ILA 1901, AFL-CIO **12-CA-129846**

ORDER

On September 9, 2014, Administrative Law Judge Robert A. Ringler, over the objections of the General Counsel, issued an on-the-record oral ruling accepting a non-Board settlement in this proceeding. Thereafter, the General Counsel filed a timely request for special permission to appeal the judge's rulings, the Respondent filed a brief in opposition, the Union filed a "Motion Filing Position of the Affected Employees and the Union," and the Respondent filed a reply to the Union's motion.

The General Counsel's request for special permission to appeal is granted and, after careful consideration, we find that it would not effectuate the purposes and policies of the Act to approve the non-Board settlement agreement. On balance, we find that the settlement agreement does not satisfy the standard set forth in *Independent Stave Co.*, 287 NLRB 740, 743 (1987),[1] and that the first two factors of that standard warrant

[1] In that case, the Board held that it would examine all of the surrounding circumstances including, but not limited to the following factors:

> (1) whether the charging party(ies), the respondent(s), and any of the individual discriminatees have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of litigation; (3) whether there has been any fraud, coercion or duress by any of the parties in reaching the

reversing the judge and revoking his approval of the settlement.[2]

First, the General Counsel opposed the settlement, which is an important consideration weighing against accepting the settlement. See, e.g., *Clark Distribution Systems*, 336 NLRB 747, 750 (2001). The parties have made conflicting assertions regarding the views of the Charging Party and the alleged discriminatees. However, in light of the General Counsel's position, as well as the factors discussed below, we find it unnecessary to rely on the positions of the Charging Party or the alleged discriminatees, and therefore we find it unnecessary to resolve the disputes between the parties concerning whether the Charging Party or the alleged discriminatees support the settlement.

Second, we find that the proposed settlement is not reasonable in light of the serious nature of the allegations, including, inter alia, allegations that the Respondent repeatedly, and through different officials, threatened employees with discharge, job loss, and plant closure if they joined or supported the Union or if the Union won a Board election; that it made good on these threats by closing two of its facilities (including one facility that the Respondent closed two days after the representation election) and discharging 28 employees; and that it told employees at one facility that it closed another facility because of employees' union activities. In particular, we note the absence of a notice-posting provision, the absence of a reinstatement remedy other than a circumscribed preferential hiring provision,[3] and the low percentage of backpay

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settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

[2] There is no allegation or evidence that the third or fourth factors warrant reversing the judge.

[3] The preferential hire provision was to positions the alleged discriminatees had not previously performed, and was conditioned on their meeting all existing qualifications

(approximately 32 percent of the amount calculated by the General Counsel), and the failure of the settlement to otherwise address a large portion of the alleged violations. Finally, the settlement agreement requires that employees waive their statutory right to engage in strikes, which provision directly implicates the General Counsel's duty to protect the public interest in the enforcement of the Act by ensuring employees' free exercise of their Section 7 rights. Taken together, these deficiencies in the agreed-upon remedy combine to leave numerous alleged violations of Section 8(a)(5), (3), and (1), including threats of reprisal and retaliatory discharge, largely unremedied.[4]

Accordingly, the General Counsel's request for special permission to appeal the Administrative Law Judge's approval of the settlement agreement is granted, the judge's approval is revoked, and the proceeding is remanded to the judge for further processing, without prejudice to further settlement negotiations consistent with this

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and training requirements; otherwise, the Respondent was free to recruit on the open market.

[4] Our dissenting colleague would refrain from revoking approval of the settlement agreement because, in his view, the agreement appropriately balances the need to remedy serious alleged violations of the Act against the risks of litigating those allegations. We disagree. As our colleague acknowledges, the agreement leaves numerous and substantial alleged violations of Sec. 8(a)(5), (3), and (1) largely unremedied, lacks the standard reinstatement remedy for the 28 discharged employees, and does not provide for the posting of a remedial notice. The absence of a notice-posting remedy is particularly troubling given the chilling effect that the partial closings and discharges are likely to have on the Respondent's remaining employees. Thus, absent the reinstatement of the alleged discriminatees -- whose return would have reassured employees -- or assurances through a notice that employees could freely exercise their statutory rights without fear of reprisal, the remaining employees would have no way of knowing whether they would likewise be subject to threats and adverse consequences if they sought to exercise their rights under the Act. Based on these considerations, these factors outweigh any other factor or factors favoring approval of the settlement, including the risks inherent in litigation. See *Flint Iceland Arenas,* 325 NLRB 318, 319 (1998) ("given the number and seriousness of the unremedied violations of Section 8(a)(1), (3), and (5) here, we cannot find that avoiding the risks of litigation is a reasonable trade-off").

Order.[5] In addition, we grant the General Counsel's request for special permission to appeal the Administrative Law Judge's rejection of GC Exhibits 2, 3, and 4, and we reverse this ruling.

Dated, Washington, D.C., April 20, 2015

MARK GASTON PEARCE, CHAIRMAN

KENT Y. HIROZAWA, MEMBER

(SEAL) **NATIONAL LABOR RELATIONS BOARD**

MEMBER MISCIMARRA, dissenting in part:

I join my colleagues in granting the General Counsel's request for special permission to appeal the Administrative Law Judge's approval of the settlement agreement in this case, because the settlement of a case such as this one – involving serious alleged violations, more than two dozen employment terminations, and the shutdown of two facilities – warrants careful scrutiny against the standard applicable to the private settlement of unfair labor practice allegations (ULPs), as set forth in *Independent Stave Co.*, 287 NLRB 740, 743 (1987). I also agree that the judge improperly excluded GC Exhibits 2, 3, and 4 that are relevant to a fair assessment of the settlement.

Unlike my colleagues, however, I would affirm the judge and refrain from revoking his approval of the agreement. I agree that the settlement presents a close

[5] In light of our Order remanding this proceeding to the Administrative Law Judge for further processing, we deny the General Counsel's request for special permission to appeal the judge's ruling remanding the non-Board settlement to the Regional Director for compliance purposes, which is now moot.

In addition, we note that nothing in this Order prevents the parties from entering into a separate agreement to settle the allegations in Case 12-CA-129846, involving the Respondent's suspension of Efrain Gonzalez.

question regarding sufficiency under the *Independent Stave* criteria, but I believe several considerations warrant upholding the judge's approval of the parties' imperfect resolution of the pending ULP allegations.

First, although it is correct that the settlement was reached as the result of private negotiations between the parties – and is opposed by the General Counsel – its negotiation occurred in the course of the proceedings pertaining to the instant case. The judge indicated there were "three or four weeks of settlement conferences," including negotiations throughout the day of the hearing (which commenced at 4:33 p.m. for the sole purpose of having the judge rule on Respondent's motion to have the settlement agreement approved).[6]

Second, the merits of the underlying allegations are not before us. However, it is important to recognize that the most substantial components of the settlement's alleged insufficiency reflect a premise that very difficult legal and factual issues, after years of additional litigation, will be resolved in the manner most favorable to the employee-claimants. The General Counsel opposes the settlement, in large part, because (a) it only provides for the payment of $200,000 to be shared by 28 claimants, which the General Counsel calculates as amounting only to around one-third of the total backpay being sought (i.e., roughly 32 percent); and (b) the settlement provides for a preferential hiring list rather than immediate reinstatement.

We have no basis upon which to determine how the merits of this case will be resolved. However, it is far from clear that the resolution of this case will result in backpay or reinstatement for any of the claimants. As my colleagues acknowledge, the

[6] The Union expressed its agreement with having the settlement approved, and the Union's counsel reported that the Union "President and the union members" had been consulted, and "each and every [union member] told us that they were in accordance with the agreement."

two facilities at issue are no longer in operation. The General Counsel alleges they were shutdown in violation of Section 8(a)(3), which prohibits antiunion discrimination, and without decision- or effects-bargaining in violation of Section 8(a)(5), and these allegations – if proven – would warrant the most onerous remedies available under our statute. However, several important Supreme Court cases also afford substantially greater deference to shutdowns than typically apply to other types of decisions.[7] The litigation of this case – if it resumes – will take many years to complete. In the prior stages of this litigation, the hearing was scheduled and rescheduled multiple times, and prehearing discussions suggest the parties were prepared to call nearly 40 witnesses.[8] Nor would issuance of a Board decision on the merits mean the claimants would immediately benefit. In one leading Board case, more than 13 years elapsed before all Board and court appeals were completed following the employer's announced shutdown and relocation of operations.[9] Even though the Board can order the resumption of

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[7] For example, under Section 8(a)(3), the Supreme Court in *Textile Workers Union v. Darlington Manufacturing Co.,* 380 U.S. 263 (1965) held that an employer has "the absolute right to terminate his entire business for any reason he pleases," Id. at 268. In *Darlington,* the Supreme Court held that "when an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice." Id. at 273-74. And regarding partial closings, the Supreme Court in *Darlington* held that discriminatory motivation will violate the Act only "if *motivated by a purpose to chill unionism* in any of the remaining plants of the single employer *and if the employer may reasonably have foreseen that such closing would likely have that effect.*" 380 U.S. at 274-75 (emphasis added). Likewise, under Section 8(a)(5), the Supreme Court held in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), "an economically-motivated decision to shut down part of a business," 452 U.S. at 680, was itself "*not* part of Section 8(d)'s terms and conditions, . . . over which Congress has mandated bargaining." Id. at 686 (emphasis added).

[8] Respondent's brief opposing the General Counsel's motion for special permission to appeal (at p. 6) reports that the General Counsel at one point indicated it would call 30 witnesses and Respondents planned to call 8 witnesses at the hearing.

[9] *Dubuque Packing Co*., 287 NLRB 499, 510-11 (1987) (ALJ opinion), remanded sub nom. *UFCW Local 150-A v. NLRB*, 880 F.2d 1422 (D.C. Cir. 1989), on remand, 303 NLRB 386, 390 fn. 8 (1991), enforced in relevant part sub nom. *UFCW Local 150-A v.*

discontinued operations – and there are many cases in which such a remedy has been required – the employer can defend against such an order on the basis of financial hardship.[10]

In short, I agree that the agreed upon remedy in this difficult case is far from perfect. The parties' settlement does not provide for the posting of a remedial notice. The agreed upon relief does not give the claimants what they had before. However, the monetary settlement is substantial, the agreement involves other understandings, and it almost certainly would have never occurred but for the Board's intervention in this case on behalf of the Union and the employee-claimants. In these circumstances, I believe the judge properly exercised his discretion in approving the settlement. Accordingly, as to this issue, I respectfully dissent.

Philip A. Miscimarra, Member

NLRB, 1 F.3d 24 (D.C. Cir. 1993), cert. granted, 511 U.S. 1016 (1994), cert. dismissed, 511 U.S. 1138 (1994).

[10] *Lear Siegler, Inc*., 295 NLRB 857 (1989)